

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

BENEDEK BROADCASTING CORPORATION d/b/a WYTV¹

Employer

and

Case No. 8-RC-16244

NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES AND TECHNICIANS-CWA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding², the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The Employer's name appears as amended at the hearing.

² Both parties submitted briefs, which have been duly considered. The Union attached exhibits to its brief, which were not introduced at the hearing. Since they are not part of the record, those exhibits were not considered in this decision.

Upon consideration of the Employer's motion to correct the transcript, I grant the motion except the reference to Page 160, Line 2 changing "back in Cobra" to "Ginko Biloba." Ginko Biloba, which is an Asiatic tree as well as an herbal remedy, does not pertain to the testimony given by the witness and has no relevance to the case. The word "Superbowl" which has been changed to "football season" is cited on Page 73, Line 5, not Page 109, as indicated in the motion. Further, the word "present" which has been changed to "prevent" is cited on Page 109, Line 23, not Page 73, as indicated in the motion.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by the Employer at its 3800 Shady Run Road, Youngstown, Ohio facility who are employed as traffic assistants, directors and assistant promotion managers, excluding all on-air personnel, and all professional employees, guards and supervisors as defined in the Act.

There are approximately five employees in the unit found appropriate herein. The parties stipulated and I find that the traffic assistants are eligible to vote in the election directed herein.

The Employer is a Delaware corporation with a facility located in Youngstown, Ohio where it is engaged in commercial television broadcasting. The Petitioner currently represents two separate bargaining units of technicians and photographers as well as on-air reporters, anchors and producers at Employer's facility³.

The only issue presented for decision herein is whether the directors and the assistant promotions manager are managers or supervisors as defined in the Act. The Employer contends

³ The Petitioner and Employer entered a Decision and Direction of Election in Case No. 8-RC-9920 into the record as Joint Exhibit 1. In that case, the Petitioner had sought to represent television directors and news photographers at WYTV, Inc., the predecessor to this Employer. In that decision, the Regional Director found that the television directors were supervisors as defined in the Act and excluded them from the bargaining unit. The Employer asserts that the 1975 decision should be applied to the present case. I do not find the case to be controlling since the

that those positions are managerial and/or supervisory and should be excluded from the unit. The Petitioner, on the other hand, argues that the positions are not supervisory or managerial and should be included in the unit.

The record reveals that the General Manager is ultimately responsible for the operation of the following departments: Production, Creative Services (or Promotion), Engineering, Sales, and News. Each department has a department manager who oversees the employees in the respective departments and attends management meetings. The directors and the assistant promotions manager do not attend these management meetings.

Assistant Promotions Manager

The current assistant promotions manager is Fran Martelli. The position is part of the Creative Services or Promotions Department. Her immediate supervisor is Ken Henderson, the Creative Services Director. The department also includes two technicians who hold the position of photographer/editor or videographer and one graphic artist.⁴ The Creative Services Department creates and produces commercials, station promotions and public service announcements.

Martelli became Assistant Promotions Manager⁵ on or about January 1, 2001. Prior to that date, she was the Promotions Producer and worked within the same department. The record revealed that Martelli essentially performed the same job functions before and after she received the new title. Martelli is responsible for the creation and production of commercials, station promotions and public service announcements. She meets with clients, creates the concept,

evidence in this matter establishes that the composition of employees and management as well as their job responsibilities have changed since that Decision issued.

⁴ At the time of the hearing, the graphic artist position was vacant.

⁵ Martelli testified that she considered her title to be assistant creative services director rather than assistant promotions manager. However, the title of assistant promotions manager was used by both parties to describe her position and is consistent with the unit description suggested by the Petitioner. Therefore, I will refer to Martelli's title as assistant promotions manager in this decision.

writes the script, schedules the performers, directs the technicians in production, and oversees the editorial work of the finished product. Martelli testified that she is responsible for the finished product of the photographer/editors. Martelli does not have the authority to contract with performers. The record established that Henderson prioritizes the projects within the Department and creates the work schedules.

Martelli also writes the daily scripts for news "topicals", which are promotions for the evening news. Those scripts must be approved by News Director Pat Livingston before they are sent to editing. The record revealed that Livingston corrected Martelli when she failed to get his approval first, since he chooses the news topics. Record testimony revealed that the photographer/editors use their own judgment to pick shots from tapes for the topicals during the editing process.

Clearly, Martelli has a wide range of discretion regarding the creative or artistic aspect of the commercials, announcements, or promotions. However, the record establishes that she does not have the authority to hire or fire employees, adjust grievances, grant time off, recommend promotions or demotions, set work schedules or submit time cards on behalf of employees. The record further revealed that Martelli neither disciplined nor recommended the discipline of any employee. While Martelli did participate in the interview process for a new graphic artist, the record establishes that no employee has been hired based upon any recommendation made by Martelli.

Martelli testified that Henderson told her that as assistant promotions manager she was part of management. However, Martelli further testified that she did not know exactly what management functions she possessed. The record is also silent in that regard.

Directors

Production Manager, Richard Stewart, manages the Production Department and supervises the two directors at issue in this case. There are also approximately 13 technicians or crew members in that department who are members of a separate bargaining unit. The Production Department produces the live news show that air during the week from 5:00 a.m. to 7:00 a.m., 5:00 p.m. to 5:30 p.m., 6:00 p.m. to 6:30 p.m. and 11:00 p.m. to 11:35 p.m. as well as two shows on the weekend at 6:00 p.m. and 11:00 p.m. The Production Manager usually directs the morning news during the week and the two directors work the evening and weekend broadcasts.

The record establishes that the director's job is to oversee the production of the newscast, which includes picking and choosing tapes to run, selecting graphics, arranging the timing of a story, moving things around in a technical manner and ensuring that the news gets on the air in a timely fashion. The director is in charge of the control room during a newscast. In that role, the director gives instructions to crewmembers such as adjusting the camera or graphic placement. The director's instructions are derived from a script given to the director by the News Department. The crewmembers do not have a copy of the script during broadcast. The record revealed that members of the News Department actually write and produce the news. The record further revealed that the director must follow the script written by the News Department. Director Brian Durkin testified that when he failed to follow a script, the News Director corrected him. The record established that the directors also take direction from producers, who are responsible for the newscast, and the News Director.

The record revealed that directors do not have the authority to hire, layoff or fire employees, adjust grievances, grant time off, grant overtime, or recommend promotions, transfers or demotions. In addition, directors do not attend department management meetings.

Although directors have sat in on grievance/disciplinary meetings with an employee and a Union representative present, the record revealed that William Lough, the Chief Engineer, actually conducted the meetings. Durkin testified that he believed that he attended those meetings as a witness and not as a management representative. Lough handles employee grievances, conducts interviews with the employees, and has the authority to discipline them.

The record indicates that the directors were involved in conducting employee evaluations in 1998. However, no evaluations were conducted prior to, or since, that time.

The record revealed that directors do not have the authority to send an employees home if disciplinary problems occur. Rather, the director alerts Production Manager Stewart concerning any employee problems.

The record revealed that Stewart posts the job assignments for the crewmembers. When an employee calls off, a director cannot remove an employee from another department to fill the vacant spot. The director contacts a manager such as Henderson, Lough, or Stewart about filling the vacancy. In addition, the directors do not grant or require overtime. Rather, pursuant to Employer policy, overtime as result of weather emergencies or late programming is mandatory.

Section 2(11) of the Act defines a supervisor as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their

grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that the possession of any one of the indicia of supervisory authority specified in Section 2(11) of the Act is sufficient to confer supervisory status upon an employee if the authority is exercised with independent judgment on behalf of management and not in a routine or sporadic manner. *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988). Therefore, “the exercise of some ‘supervisory authority’ in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” *Id.* In applying the indicia of assignment and responsible direction, the Board must distinguish between the exercise of independent judgment and the giving of routine instructions or between the appearance of supervision and supervision in fact. *King Broadcasting Company d/b/a KGW-TV*, 329 NLRB No. 39 (*slip op.* September 30, 1999),⁶

As noted, it is clear from the record that generally the directors and the assistant promotions manager do not have supervisory authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward employees or to adjust their grievances, or effectively recommend such action within the meaning of Section 2(11) of the Act.

The Employer contends that directors have recommended the discipline of employees. There is evidence of a few isolated instances where the director has recommended the promotion or discipline of an employee. In all of these instances, the record is not conclusive as to whether such action was taken by supervisors without an independent investigation of a director’s recommendation. In *Westinghouse Broadcasting Company, Inc.*, 216 NLRB 327 (1975) the Board held that the producers/directors were not supervisors where there was no evidence of any

employment actions taken in reliance of a producer/director's recommendation and independent sources of information and recommendation by recognized supervisors dictated the result. In the instant case, the Employer's witness testified that a director had recommended firing an employee but the Employer did not follow this recommendation since Lough conducted an interview of the employee and ultimately decided to suspend the employee.

The Board has held that merely having the authority to assign work does not establish statutory supervisory authority.⁷ An assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). "Even the exercise of substantial and significant judgment by employees in instructing other employees based on their own training, experience and expertise does not translate into supervisory authority responsibly to direct other employees."⁸ The party asserting supervisory status bears the burden of proving supervisory authority. N.L.R.B. v. Kentucky River Community Care, Inc., 121 S. Ct. 1861 (2001).

Based upon a case by case analysis of traditional supervisory indicia, the Board has held that producers and directors in the broadcast industry are not manager or supervisors as defined in the Act⁹. In making its case by case determinations, the Board looks at the duties performed by the producers and directors, not the titles assigned to them by employers.¹⁰

I find that the Employer has failed to meet its burden of establishing that either the directors or the assistant promotion manager are managers or supervisors within the meaning of the Act.

⁶ citing: Providence Hospital, 320 NLRB 717, 725 (1996)

⁷ see e.g.: Mississippi Power & Light Company, 328 NLRB No. 146 (July 26, 1999); Nymed, Inc. d/b/a Ten Broeck Commons, 320 NLRB 806, 811 (1996)

⁸ King Broadcasting, *supra.*, slip op at 6; Westinghouse Broadcasting Company, Inc., 215 NLRB 123, 125 (1974)

⁹ The Board did find news producers as supervisors under the Act when the producers attended monthly meetings with the news director and other managers to discuss and formulate company policy decisions. Westinghouse Broadcasting Co., Inc., 195 NLRB 339 (1972).

¹⁰ see e.g.: King Broadcasting Company (KGW-TV), 329 NLRB No. 39 (*slip op.* September 30, 1999); McGraw-Hill Broadcasting Company, Inc. d/b/a KGTV, 329 NLRB No. 48 (*slip op.* September 30, 1999); Westinghouse

In the instant case, while the directors oversee the whole production and give directions to reach the desired creative effect of producing a newscast, I find that they do not responsibly direct the work of the technicians. Likewise, assistant promotion manager creates and produces various pieces, but it appears from the record that any instructions that she may give to other employees are motivated by the creative or artistic effect that she wishes to achieve.

The job duties of the employees at issue in this case are similar to those of the producers at issue in *King Broadcasting*, *supra*... In *King*, the petitioner sought to represent a unit which included producers, associate producers, assignment editors and copy editors in the bargaining unit. In that case, producers organized, coordinated and directed the production activities of daily newscasts. The producers were responsible for newscast content and presentation, including designation of stories, video content, camera shots, graphics, commercials and the use of live or taped coverage. The producers assigned the writing of the stories and, if dissatisfied with a piece, could ask the writer for a re-draft, assign it to another employee or re-write the piece themselves. Prior to the actual newscast, the producers coordinated the work of other employees in the newsroom. During the newscast, the producers sat in the production room with the director, technical director, audio engineer, and the operator of machines. The producer gave the rundown and instructions to the directors who then conveyed them to the technical team and were responsible for the show's content and pace.

In *King*, the Board found that the employees at issue were not supervisors noting that they were, rather, part of an "...integrated team in which their skills and responsibilities were joined in a collaborative effort with those of other ... employees in order to coordinate and

Broadcasting Co., Inc., 216 NLRB 327 (1975); *Westinghouse Broadcasting Company, Inc.*, 215 NLRB 123 (1974).

develop a single product." ¹¹ Like the directors and the assistant promotion manager at issue here, the Board in King found that any discretion or judgment that the employees exercised in making and communicating instruction to others related to their own job responsibilities and was based upon their expertise and experience.

The record establishes that the director's instructions to the technical crew are either routine in nature or are motivated by the creative or artistic effect the directors seek to achieve in directing the production of the newscast. The Board has held that the authority of an individual employee to direct another to perform discrete tasks resulting from the directing employee's experience, skills, training or position is not supervisory authority. In those circumstances, the Board has found that such directions are "simply incidental to the employees' ability to perform their own work." ¹²In the instant case, the director does not instruct the technical crew as to how to perform their jobs since the technicians have distinct technical skills or expertise that the director does not possess. Rather, the director is part of an integrated production team, each member of which is independently capable of executing his own assignment. In addition, a director works with the producer in the control room as well as the news department in coordinating the script.

The Employer asserts that directors are supervisors perform employee evaluations. As noted, the record revealed that the directors performed employee evaluations in 1998, but they did not conduct evaluations before or after 1998. The performance of these evaluations is not indicative of supervisory authority, since it was not conducted on a regular basis. Further, there is no evidence showing that the evaluations were used, without an independent investigation of the employee's work, to affect an employee's employment. In, Somerset Welding & Steel, Inc.,

¹¹ Id. slip op at 5; Westinghouse Broadcasting Co., 215 NLRB 123 (1974).

¹² King, slip op at 7

291 NLRB 913, 914 (1988) the Board held that the fact that leadmen conducted two employee evaluations was insufficient to establish that they were supervisors without evidence that management acted on these evaluations without independent investigation or that the evaluations constituted effective recommendations for promotions, wage increase or discipline.

The Employer argues that directors have the authority to send employees home and to grant overtime. However, there is no evidence that a director ever actually sent an employee home due to disciplinary problems. Though the directors at times may move people around in production when a person calls off, it appears from the record that the director is making decisions to effectuate the creative process of producing a newscast.

As noted, the record does not establish that the directors actually grant overtime since, pursuant to Employer policy, overtime is mandatory when weather emergencies or the completion of a program already in progress necessitate exceeding scheduled working hours.

Even assuming, *arguendo*, that the directors or the assistant promotions manager occasionally exercise what might be considered supervisory authority, the Board has held that it will not exclude persons as supervisors if they exercise authority on a sporadic or irregular basis. **Training School at Vineland**, 322 NLRB No. 152 (slip. op. December 15, 2000); **Westinghouse Broadcasting Co., Inc.**, 215 NLRB 123 (1974).

In its brief, the Employer cites **Pacific FM, Inc. d/b/a KOFY, Operator of KOFY TV-20**, 332 NLRB No. 67 (slip op. September 29, 2000) in support of its contention that the assistant promotion manager is a supervisor within the meaning of the Act. In that case, the administrative law judge found a "promotions director" to be a supervisor based upon his conclusion that the employee at issue "responsibly directed" the work of subordinates and was fully accountable and responsible for their performance. However, the case provides little

illumination as to the actual nature of the work performed by the promotion directors' subordinates. In addition, from the factual recitation provided, it does not appear that the work performed by the promotions director is comparable to the work performed by the assistant promotions manager in the instant matter.

The Employer, however, argues that the assistant promotions manager has “independence of action” and has supervisory authority over the two technicians in the department. The Employer further asserts that Martelli has the authority to discipline or discharge employees and participates in the hiring process for a new graphic artist. It is undisputed, however, that no one has been hired based upon any recommendation offered by Martelli and that Martelli never exercised any disciplinary authority. In fact, Martelli testified that she was not even aware that she possessed such authority. The record revealed that the photographer/editors, who are members of a separate bargaining unit, do not consider Martelli as their supervisor and do not believe that she has any authority to discipline them. The editors receive their work schedule from Stewart, the Production Manager, or Henderson, and they contact Henderson for call outs.

The Employer argues that the Creative Services Director no longer oversees or reviews Martelli's work since she began her new position and that Martelli is ultimately responsible for the finished product of the photographer/editors. The record revealed that Martelli works in conjunction with the photographer/editors as a team rather than as a their supervisor. In doing so, she does not responsibly “direct their work.” Rather, they work together in the creative process to determine which shoot or position is better. In addition, Jeff Necko testified that he worked with clients by himself without Martelli's supervision or presence.

Martelli also does not direct the technician's work when she at times may select one photographer/editor over the other depending upon the project involved. Martelli uses her

artistic judgment in determining which person's skill would capture the shoot depending on the job. Martelli cannot release a worker from another job in order to work with her. She must first go to her supervisor Ken Henderson for changes in work assignments, since Mr. Henderson is the one who prioritizes the jobs.

In **McGraw-Hill Broadcasting Co., Inc., d/b/a KGTV**, 329 NLRB No. 48 (*slip op.* September 30, 1999), the Board found that a producer, with job duties similar to those of the assistant promotions manager here, was not a supervisor within the meaning of the Act. In the cited case, the producer, like Martelli, met with clients to develop an idea or concept for a commercial and then worked with the clients to create the commercial. The producer, like Martelli, also writes the script, arranged for and scheduled photographers, lighting assistants, actors, and any other personnel necessary for the shoot or videotaping. The producer, like Martelli, was responsible for directing the shoot, designing the graphics, and generally overseeing all production aspects including the final editing. The Board held that the producer was not a supervisor because all of these tasks, like those performed by the employees at issue herein, were related to the artistic or creative effect the producer sought to achieve. The directions given to the technicians, photographers, and other members of the production team by the producer related to the producer's own responsibilities and was based on her experience and expertise.

Further, I find that the mere absence of the Creative Services Director or Production Manager during evening or weekend hours does not *per se* transfer supervisory authority to the directors or assistant promotions manager. Rather, I conclude from the entire record the significant consideration is the routine or artistic nature of the jobs performed by the directors

and assistant promotions manager and their coworkers rather than the absence of designated supervisors.

Having concluded that directors and assistant promotions manager are not statutory supervisors, I will consider the Employer's alternative argument that they must be excluded from the bargaining unit because they are managerial employees. Managerial employees are defined as "...those who formulate and effectuate policies by expressing and making operative the decisions of their employers" *N.L.R.B. v Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267 (1974). The Board excludes as managerial those employees who formulate, determine, and effectuate an employer's policies and those who have discretion in the performance of their jobs but not if that discretion must conform to an employer's established policy. *Bell Aerospace, a Division of Textron, Inc.*, 219 NLRB 384 (1975)

While it is undisputed that the assistant promotions manager has been told that she is a member of management, the record is devoid of evidence that she formulates, determines or effectuates the Employer's policies. The Employer asserts that directors have represented management in grievance meetings with an employee and represented the station at conferences and telethons. However, it appears that the directors' role at any grievance meetings that they attend is more akin to acting as a witness than representing or enforcing management views and policies. Neither directors nor the assistant promotions manager attend the department head meetings. They also cannot effectuate or formulate station management policies. Though the assistant promotions manager and the directors have considerable discretion in executing their assignments, their discretion does not exceed the bounds of policy determined by others. Therefore, I conclude that the assistant promotions manager and the directors are not managerial employees.

Based upon the foregoing and the record as a whole, I find that the directors and the assistant promotions manager are neither manager nor supervisors as defined in the Act. I shall, therefore, include them in the unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees of Benedek Broadcasting Corporation d/b/a WYTV. in the bargaining unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-CWA, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by August 27, 2001.

DATED , at Cleveland, Ohio this 13th day of August, 2001.

/s/ Frederick J. Calatrello

Frederick J. Calatrello, Regional Director
National Labor Relations Board, Region 8

347-4040